Howard Immel, Inc. *and* International Union of Operating Engineers Local 139, AFL–CIO. Case 30–CA–12242

July 20, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On March 6, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed limited exceptions and a supporting brief. The Respondent filed a response and cross-exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order, as modified and set forth in full below.[1]

1. At the hearing, the Respondent's president admitted that the Respondent, consistent with its April 8, 1993 letter to the Laborers, unilaterally changed work-assignment practices by reassigning the operation of its forklifts and skid steer loader (Bobcat) from the Operating Engineers Local 139 unit to the Laborers unit. The General Counsel then amended the complaint to allege that the work-assignment change violated Section 8(a)(5) and (1). The issue was fully litigated. The judge found, in section II,C of his decision, that the Respondent changed its work-assignment practices by reassigning Operating Engineers' unit work to the Laborers unit. He failed, however, to conform clearly his Conclusions of Law, remedy, recommended Order, and notice to his factual findings. The General Counsel excepts to the judge's failure to conclude explicitly that Respondent unilaterally changed work-assignment practices. We grant the General Counsel's exception and clarify that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its work-assignment practices. We will modify the judge's Conclusions of Law, his remedy, recommended Order, and notice accordingly.

2. The complaint alleged and the judge found, in the sixth paragraph of section II,D of his decision, that the Respondent violated Section 8(a)(5) and (1) by failing to provide Local 139 with an opportunity to bargain about the effects on unit employees of the Respondent's sale of the Grove TM180 crane.[2] The judge confirms this finding in his Conclusion of Law 3. In paragraph 1(a) of his recommended Order, however, the judge required the Respondent to cease and desist from ''[m]aking decisions to *subcontract the work of unit employees* without providing Local 139 with notice and the opportunity to bargain over the effects of such decisions. . . .'' (Emphasis added.) By phrasing the Order in this language, the judge has given the incorrect impression that the violation found was a failure to bargain about the decision to subcontract. In fact, the violation was a failure to bargain about the effects of the decision to sell the crane, and one such effect of that decision was the subcontracting of the work. In order to clarify this matter, we will modify judge's remedy, recommended Order, and notice.

AMENDED CONCLUSIONS OF LAW

3. Substitute the following for the judge's Conclusion of Law 3.

''3. By changing work-assignment practices without providing Local 139 with notice and the opportunity to bargain about this change; by selling its crane without providing Local 139 with notice and the opportunity to bargain over the effects of the decision to sell it; by altering the rates of pay and level of benefits of the employees in the unit described above without providing Local 139 with notice and an opportunity to bargain concerning such actions; by direct dealing with unit employees; and by withdrawing recognition from Local 139 as the exclusive representative of the employees in that unit and refusing to meet and bargain with the Union for a new collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.''

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(5) and (1) by unilaterally changing work-assignment practices since April 8, 1993, we shall order that the Respondent shall, on request of the Union, re-

[1] The Respondent has excepted only to that portion of the judge's Order that, according to the Respondent, ''requires the Respondent to notify Local 139 prior to subcontracting.'' We find no merit in the Respondent's exception. In addition, we emphasize that although the Respondent's response to the General Counsel's exceptions purports to ''reserve[] its right to appeal any final order of the Board to the 7th Circuit Court of Appeals,'' the Respondent has failed to place any other unfair labor practice finding before the Board by way of properly filed exceptions. See Sec. 10(e) of the Act; Secs. 102.46(b) and 102.48(a) of the Board's Rules and Regulations.

[2] As the judge found, the General Counsel does not allege that the Respondent had an obligation to bargain over the decision to sell the crane.

store the work-assignment practices that were in effect before that date, and make whole unit employees for any losses suffered as a result of its unilateral action. We shall also order the Respondent to rescind any outstanding agreements or contracts, written or oral, to subcontract crane operations as an effect of its decision to sell its crane, to the extent that any such agreements or contracts involve the leasing of the services of crane operators to perform Operating Engineers' unit work. In addition, we shall order the Respondent to make whole unit employees by making all required fringe benefit contributions that have not been made since May 1993, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),[3] and by reimbursing the employees and individuals for any expenses incurred from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Howard Immel, Inc., Green Bay, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing work-assignment practices without providing International Union of Operating Engineers Local 139 with notice and the opportunity to bargain about such changes; failing to provide Local 139 with notice and the opportunity to bargain over the effects of its decision to sell its crane; unilaterally altering the rates of pay and level of benefits of unit employees without providing Local 139 with notice and an opportunity to bargain concerning such action; dealing directly with unit employees; and withdrawing recognition from Local 139 as the exclusive representative of unit employees and refusing to meet and bargain with that Union for a new collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 139 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement:

> All operating engineers, excluding guards and supervisors as defined in the Act and all other employees.

(b) Make whole employees for any loss of wages or other employee benefits they may have suffered as a result of Respondent's unilateral action, including, but not limited to, contributions to Local 139's fringe benefit funds, as set forth in the amended remedy section of this decision.

(c) On request, bargain with Local 139 over the effects of the decision to sell the crane.

(d) On request of Local 139, rescind any outstanding agreements or contracts, whether written or oral, to subcontract crane operations as an effect of the Respondent's decision to sell its crane, to the extent that any such agreements or contracts involve the leasing of the services of crane operators to perform unit work.

(e) On request of Local 139, restore the work-assignment practices that were in effect before April 8, 1993.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Green Bay, Wisconsin, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's contributions to a fund during the period since May 1993, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. *Donovan & Associates*, 316 NLRB 169, 170 fn. 2 (1995).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT change our work-assignment practices without providing International Union of Operating Engineers Local 139 with notice and the opportunity to bargain about such reassignments.

WE WILL NOT fail to give Local 139 notice and an opportunity to bargain about the effects of our decision to sell our crane on employees in the following appropriate unit:

> All operating engineers, excluding guards and supervisors as defined in the Act and all other employees.

WE WILL NOT unilaterally change the rates of pay and level of benefits for unit employees without providing Local 139 with notice and an opportunity to bargain concerning such actions.

WE WILL NOT deal directly with unit employees over wages, hours, and other terms and conditions of employment.

WE WILL NOT withdraw recognition from Local 139 as the exclusive representative of the employees in the unit described above and WE WILL NOT refuse to meet and bargain with that Union for a new collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with Local 139 as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement.

WE WILL, on request, bargain with Local 139 about the effects on unit employees of our decision to sell our crane.

WE WILL, on request of Local 139, rescind any outstanding agreements or contracts, whether written or oral, to subcontract crane operations as an effect of our decision to sell our crane, to the extent that any such agreements or contracts involve the leasing of the services of a crane operator to perform unit work.

WE WILL make whole our employees for any loss of wages, or other employee benefits they may have suffered as a result of our unilateral actions, including, but not limited to, contributions to Local 139's fringe benefit funds, with interest.

HOWARD IMMEL, INC.

Benjamin Mandelman, Esq., for the General Counsel.
Paul D. Lawent, Esq., for the Respondent.
Warren Kaston, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Green Bay, Wisconsin, on November 2, 1994, based upon charges filed on August 23, 1993, by the International Union of Operating Engineers Local No. 139, AFL–CIO (the Operating Engineers or Local 139), and a complaint issued by the Regional Director of Region 30 of the National Labor Relations Board (the Board), on September 30, 1993, as amended. The complaint alleges that Howard Immel, Inc. (the Respondent or Immel), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by withdrawing recognition from the Union, unilaterally changing terms and conditions of employment, and dealing directly with unit employees. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

Jurisdiction and labor organization status are not in dispute. The complaint alleges, Respondent's answer admits, and I find and conclude that, at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 139 is a labor organization within the meaning of Section 2(5) of the Act. I further find and conclude that Laborers' International Union of North America, Local 539 (the Laborers or Local 559), has been a labor organization within the meaning of Section 2(5) at all material times.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Collective-Bargaining History*

Respondent is a general contractor with its office in Green Bay, Wisconsin. It is a closely held corporation, owned and operated by Greg and Gary Immel, Robert Huettle, and Elton Harpt. Harpt was its president until August 1, 1993, responsible for its labor relations.

For 15 or more years, Immel has had a series of collective-bargaining agreements with the Operating Engineers. On August 23, 1990, it signed a Memorandum of Agreement (G.C. Exh. 2(a))[1] binding it to the terms of the Building and

[1] References to the General Counsel's exhibits are G.C. Exh., those to the Respondent's exhibits are R. Exh.

Heavy Construction Master Agreement between the AGC and Local 139, effective from June 1, 1990, to May 31, 1993.[2] The memorandum recited that Respondent had recognized the Operating Engineers on the basis of a demonstrated majority status as established by authorization cards, i.e., pursuant to Section 9(a) of the Act.

For at least as long, Immel has also been party to a series of collective-bargaining agreements with the Laborers through the Fox River Valley Contractors Association. In November 1992, it extended 9(a) recognition to the Laborers. It was party to the June 4, 1990, to June 1, 1993 Laborers' Association master agreement and is currently party to the master agreement effective from June 1, 1993, to May 31, 1996.

B. *Contract Terms and Practice*

There is no disputing that Respondent's labor agreements overlapped in terms of jurisdiction. The Operating Engineers' contract provided that the operation of cranes, skid steer loaders (also known as Bobcats), and forklifts be assigned to employees working under its agreement (G.C. Exh. 2(b), secs. 1.3, 6.1, and 9.1). The Laborers' contract similarly provides that Bobcats and skid steer loaders are to be operated by employees working under its terms.

For many years, Respondent has employed two members of the Operating Engineers, Keith Johnson and Joseph Pelishek. It also had at least one operable crane and several Bobcats and forklifts. In practice, Respondent has given priority in the operation of all of this equipment to these members of the Operating Engineers and they were the principal operators of that equipment.

Thus, whenever the crane was utilized, Johnson was its operator. When not operating the crane, he had priority over all other employees to operate the forklift and the Bobcat. He was paid at the Operating Engineers contract's hourly rates for all of this work. When not operating any of this equipment, he performed the duties of a laborer, at the Laborers rates. Most of his time was paid at operators' rates. He received all of his fringe benefits under the terms of the Operating Engineers agreement.

Pelishek had priority to operate the forklifts and Bobcats over everyone except Johnson. Like Johnson, he also worked as a laborer when not on the equipment. His hourly pay depended on whether he was operating the equipment or performing laborer's functions; for about half of his time, he was paid on the Operating Engineers scale. All of his benefits were paid to the Operating Engineers welfare funds. Pelishek had been a member of the Laborers since 1965 and a member of the Operating Engineers since 1969.

Occasionally, Respondent employed other members of the Operating Engineers, referred to it by that union. However, for much of the time, Johnson and Pelishek were the only Operating Engineers on its worksites. When additional work on the Bobcats and forklifts was required, either because Johnson and Pelishek were otherwise occupied or because they were on other sites, laborers, masons, and carpenters operated them.

Although Johnson and Pelishek had worked for Respondent for many years, there were times when one or both of them were laid off as the business cycle progressed seasonally. They would be laid off with the expectation of being recalled as business picked up and were recalled each year.

C. *Termination of Relationship and Related Events*

The Operating Engineers-AGC Master Agreement provides that notice of termination or modification of its terms must be given 60 to 90 days before its May 31 expiration. On February 17, Local 139 gave Respondent notice of its intent to reopen the agreement and requested a meeting before May 31 (G.C. Exh. 3). Respondent replied on March 18, giving notice that it was terminating that agreement upon its expiration (G.C. Exh. 4). Local 139 repeated its request to meet on April 22 (G.C. Exh. 5).

On April 8, Immel notified the Laborers that, henceforth, it was assigning the operation of the forklifts and Bobcats to members of that union, pursuant to its collective-bargaining agreement (R. Exh. 1). No such notice was provided to the Operating Engineers. On April 12, Respondent sold its last operable crane. It did so without notice to Local 139 and without offering to bargain on the effects of that action on the unit employees.

On May 6, Immel wrote the following to Local 139:

> Howard Immel Inc. does not intend to perform the type of work that would require it to hire Operating Engineers in the future. We have less than two persons represented by your union on our payroll.
>
> Given the above facts, we believe that there would be no purpose in scheduling negotiations. If you disagree with our understanding, please let us know why. (G.C. Exh. 6.)

The Operating Engineers made repeated attempts to schedule a meeting. One was set and then aborted at the last moment by Respondent. That Union sent another letter seeking a meeting for the purpose of negotiating an agreement (G.C. Exh. 7), and, on July 28, Respondent's counsel replied. He stated that Immel:

> . . . no longer performs Operating Engineers work and no longer employs members of your labor organization. All craftworkers employed by Howard Immel, Inc., are represented by other labor organizations.
>
> Although the Company is not obligated to bargain a successor agreement, the Company will discuss the situation with representatives of Local 139 if the Union so desires.

Meeting dates of August 4 or 5 were offered (G.C. Exh. 8). The Union confirmed a meeting for August 4.

The positions stated in Respondent's letters of May 6 and July 28 were reiterated in the August 4 meeting. Harpt, for Respondent, told the Union that it no longer owned a crane and was assigning the Bobcats and forklifts to the Laborers even though that work had predominantly been assigned to Engineers in the past. Harpt acknowledged that it had not notified Local 139 before taking this action and asserted that it was only telling them, not bargaining with them, about it.

Notwithstanding the claims in Immel's letter, it has continued to utilize cranes, at least four or five times a year. When a crane was needed, it has leased one, together with an operator. It could have leased cranes without operators. Immel also continued to utilize Bobcats and forklifts as it had in the

[2] All dates hereinafter are 1993 unless otherwise specified.

past. Johnson and Pelishek, upon his return to work in mid-July, continued to have priority in operating them.

Pelishek was on a seasonal layoff from April until mid-July. In April, he was told by Van Rixel, Respondent's field supervisor, that Respondent was not going to sign another contract with the Operating Engineers. On his return to work, the Laborers business agent told Pelishek that he would be doing Laborer's work thereafter. Since then, he has continued to spend about half of his time operating the Bobcats and the forklifts. His wages have been those of the Laborers contract. Pelishek retained his membership in the Operating Engineers until the fall 1994.

Sometime in May, Johnson asked Van Rixel whether Immel had sold the crane and whether the rumor that it was not going to sign with the Operating Engineers was true. Van Rixel confirmed both and assured Johnson that he could stay on as an employee. In a meeting in Greg Immel's office, Johnson was told that he would continue to operate the equipment, that he would be getting a special rate, and that he would be going into the Laborers union. Subsequently, he was told that he would be paid the Carpenters rate of $18 per hour when he was running the equipment, that he would have priority to run that equipment, that he would get the Laborers scale when otherwise occupied, that he would participate in the Laborers fringe benefit package, and that Respondent would pay his Laborers initiation fee. Since then, he has spent most of his time operating the Bobcat and the forklift. He joined the Laborers Union in August.

Since June 1, Respondent has made no contributions to the Operating Engineers fringe benefit funds. Both of the employees have been under the Laborers agreement for fringe benefits. Johnson was without health coverage for a period of time as he had to satisfy a period of employment requirement under that contract before benefits were available.

Harpt acknowledged that it assigned the operation of the Bobcats and forklifts to the Laborers because the Laborers cost him less than did the Operating Engineers.

D. *Analysis*

Respondent's initial contention is that, when it withdrew recognition from the Operating Engineers, there was but one employee in that Union's unit. Thus, it asserts, that unit was no longer appropriate for collective bargaining and a bargaining order was precluded. This line of argument fails because, at all material times, there were two employees in that unit, Johnson, who worked throughout the entire period, and Pelishek, who was on a seasonal layoff with a reasonable expectancy of recall. The stable single-employee unit required before the Board will withhold its processes simply did not exist. *McDaniel Electric*, 313 NLRB 126, 127 (1993); *Finger Lakes Plumbing & Heating Co*., 253 NLRB 406, 410 (1980).

Respondent further asserts that, even if Pelishek must be considered an employee, ''he had a closer 'community of interest' with the Laborers'' and he should be considered as within that Union's unit rather than that represented by the Operating Engineers. The record reflects that Pelishek spent about half of his time performing work which was within the latter Union's unit (albeit that it was also within the overlapping jurisdiction of the Laborers), that that work had been assigned to him because he was a member of the Operating Engineers, that he was paid under the Operating Engineers contract when so occupied, and that he received all of his fringe benefits pursuant to the provisions of the Operating Engineers contract and fringe benefit funds. He was, at most, a dual-function employee. With respect to the unit placement of such employees, the Board has stated that the amount of unit work performed is the critical factor. *Oxford Chemicals*, 286 NLRB 187, 188 (1987). In that case, the Board included within the unit a dual-function employee who spent between 25 and 37.5 percent of his time, 2 to 3 hours per day, performing unit work and rejected a claim that the unit had a stable single employee complement.

Finally, Respondent claims that its relationship with the Operating Engineers was pursuant to Section 8(f), notwithstanding the 9(a) recognition language contained therein. As an 8(f) agreement, i.e., one reached under Section 8(f)(1) without proof of majority status, Respondent would have been privileged to withdraw recognition upon the contract's expiration. *John Deklewa & Sons*, 282 NLRB 1375, 1386 (1987). I find no warrant in this record for ignoring the express terms of the 9(a) recognition agreement signed by Respondent and the Operating Engineers (G.C. Exh. 2a). That the parties' agreement includes a 7-day rather than a 30-day union-security clause and a hiring hall referral procedure (as authorized for agreements covering employees in the building and construction industry by Sec. 8(f)(2) and (3)), does not place their relationship under Section 8(f)(1) or negate the recognition agreement they signed. Neither does the subcontracting clause which Respondent asserts was ''arguably'' violative of Section 8(e) ''because the agreement is no longer an 8(f) agreement.'' Whether such a clause is violative of Section 8(e) is dependent on whether the employer is ''in the construction industry,'' not whether its union contract was reached under Section 8(f)(1). Moreover, no charge of a Section 8(e) violation has been filed and the legitimacy of the subcontracting clause is not before me.

The violations alleged in the complaint flow from the foregoing conclusions. Thus, as a full 9(a) representative, Local 139 enjoys a presumption of continued majority status which, unrebutted as it is here, compels bargaining for a successor agreement. *Deklewa*, supra at 1387. Respondent's withdrawal of recognition from the Operating Engineers, its termination of the benefits accruing under its contract with that Union, and its refusal to enter into negotiations for a successor agreement, I find, violated Section 8(a)(5) and (1) of the Act. *Nave, Inc*., 306 NLRB 926, 932–933 (1992).

I further find that Respondent violated Section 8(a)(5) and (1) when it engaged in direct negotiations with its employees concerning the wages and other benefits they would receive working as laborers rather than as operating engineers.[3] It also violated these sections when it unilaterally changed their terms and conditions of employment, neglecting to give notice of such bargaining to Local 139 and excluding that Union from participating in the negotiations resulting in the altered working conditions. *Nave, Inc*., supra at 930–932.

Finally, I find, in agreement with the General Counsel, that Respondent's failure to notify and bargain with Local 139 over the effects of its sale of the crane violated Section

[3] As discussed above, those changes included a special rate for Johnson and agreed to pay his initiation fee in the Laborers Union. Had it been alleged as an independent violation, I would also have found the latter action violative of Sec. 8(a)(2) and (1). *Sweater Bee By Banff, Ltd*., 197 NLRB 805 (1972).

8(a)(5) and (1). The issue is not as posed by Respondent, whether it had to bargain with the Union over the decision to sell the crane. General Counsel does not raise that issue and only asserts an obligation to bargain over the effects of such a sale. As the Board noted in *Holly Farms Corp*., 311 NLRB 273, 278 (1993), ''employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain.''

Prior to that sale, Johnson had exclusively operated the crane. Respondent did not cease utilizing cranes in its business. Rather, it commenced leasing cranes as needed, with an operator's services included in those leases. As Harpt acknowledged, it could have leased cranes without operators, thereby continuing to assign the crane operation to Johnson. And, as he further acknowledged, it took the actions it did because it found those actions less expensive than continuing to deal with the Operating Engineers. Respondent, in effect, subcontracted the operation of the cranes it used in the course of its business to independent contractors. All that changed was the identity of the person operating the crane.

What occurred here was what the Board has termed ''*Fibreboard* subcontracting,'' decisions which do ''not involve 'a change in the scope or direction of the enterprise' and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation defined in the Act.'' *Torrington Industries*, 307 NLRB 809, 810 (1992), quoting from *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981), which, in turn, cited *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964). Such decisions, and certainly the effects thereof, are mandatory subjects of bargaining. *Torrington Industries*, supra at 810–811. By failing to give notice and bargain on request about those effects, Respondent has violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All operating engineers, excluding guards and supervisors as defined in the Act and all other employees.

2. At all material times, Local 139 has been the designated exclusive collective-bargaining representative of the employees in the unit set forth above and has been recognized as such by the Respondent, pursuant to Section 9(a) of the Act.

3. By selling its crane without providing Local 139 with notice and the opportunity to bargain over the effects of such decision, by altering the rates of pay and level of benefits of the employees in the unit described above without providing Local 139 with notice and an opportunity to bargain concerning such actions, and by withdrawing recognition from Local 139 as the exclusive representative of the employees in that unit and refusing to meet and bargain with that Union for a new collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully changed the wages and benefits paid to the unit employees, I shall recommend that it be required to restore the terms and conditions which were in effect as of May 31, 1993, and make its employees whole for any losses they experienced as a result of its unilateral action, including but not limited to contributions to Local 139's fringe benefit funds. *Merryweather Optical Co*., 240 NLRB 1213 (1979). Interest is to be computed as prescribed by *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Howard Immel, Inc., Green Bay, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making decisions to subcontract the work of unit employees without providing Local 139 with notice and the opportunity to bargain over the effects of such decisions, unilaterally altering the rates of pay and level of benefits of the employees in the unit described above without providing Local 139 with notice and an opportunity to bargain concerning such actions, and withdrawing recognition from Local 139 as the exclusive representative of the employees in that unit and refusing to meet and bargain with that Union for a new collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 139 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement:

> All operating engineers, excluding guards and supervisors as defined in the Act and all other employees.

(b) Make whole its employees for any loss of wages or other employee benefits they may have suffered as a result of Respondent's unilateral action, including but not limited to contributions to Local 139's fringe benefit funds, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Green Bay, Wisconsin, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''